

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KELLE LAMBERT and BETSY BURKEY,)	CASE NO.
Personal Representatives of the)	
Estate of DONALD E. BURKEY,)	
)	
Plaintiffs,)	COMPLAINT AND
)	DEMAND FOR JURY TRIAL
vs.)	
)	
THE UNITED STATES OF AMERICA,)	
CREIGHTON UNIVERSITY, JOCELYN)	
ROWE M.D., SUSAN CONSTANTINO)	
M.D. and ROWEN K. ZETTERMAN M.D.,)	
)	
Defendants.)	

COME NOW Plaintiffs Kelle Lambert and Betsy Burkey, Co-personal
Representatives of the Estate of Donald E. Burkey, and allege:

JURISDICTION AND PARTIES

1. This action is based on the Federal Tort Claims Act, 28 U.S.C. §2401(B).

A claim was presented on or about October 22, 2007 by Plaintiffs through their attorney to the Department of Veterans Affairs for the wrongful death of Donald E. Burkey, on or about April 8, 2007. A copy of that claim is marked Exhibit A, attached hereto and incorporated hereby by reference. No ruling on the claim was received by Plaintiffs within six months of filing, and plaintiff's have withdrawn their claim, and all conditions precedent to filing this action have been completed.

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2. The negligent acts or omissions, which led to the death of Donald E. Burkey, occurred in Omaha, Nebraska, at the Veterans Hospital in the above entitled judicial district.

3. Defendant, The United States of America, through the Department of Veterans Affairs, operates the Omaha Veterans Affairs Hospital.

4. Defendant Creighton University is a Nebraska Non-Profit Corporation that operates a Medical School and Residency Program that trains and supplies teaching physicians and residents to the Omaha Veterans Affairs Hospital.

5. At all times material hereto, Jocelyn Rowe, M.D. was an agent and employee of the Omaha Veterans Affairs Hospital and Defendant and/or Creighton University, and was acting within the course and scope of her employment.

6. At all times material hereto, Susan Constantino, M.D. was an agent and employee of the Omaha Veterans Affairs Hospital and Defendant and/or Creighton University, and was acting within the course and scope of her employment.

7. At all relevant times, Rowen K. Zetterman, M.D. was Chief of Staff of the Omaha Veterans Affairs Hospital and had supervisory authority over Doctors Constantino and Rowe, and all nursing staff and other employees of Omaha Veterans Affairs Hospital who provided medical care to Donald E. Burkey.

8. On April 8, 2007, Donald E. Burkey was under the care of the Omaha Veterans Affairs Hospital. At all times material hereto, all persons caring for Donald E. Burkey were employees of the Defendant, Omaha Veterans Affairs and Defendant and/or Creighton University, and were acting within the course and scope of their employment.

9. On April 8, 2007, the negligent acts and omissions of Dr. Jocelyn Rowe, Dr. Susan Constantino, and employees of the Omaha Veterans Affairs Hospital and or Creighton University, all of which acts fell below the standard of care governing medical practitioners in Omaha, Nebraska, led to the death of Donald E. Burkey. Donald E. Burkey's death was caused by multiple blunt force trauma with complications and adverse drug reaction/intoxication. Donald E. Burkey was a victim of multiple blunt force trauma with complications, suffered cardiac arrest after he was given Haldol and Morphine injection(s). The negligent acts and omissions include, but are not limited to, the following:

- a. Administering Ativan in levels that caused an overdose in Donald E. Burkey;
- b. Failing to recognize the adverse reactions of Donald E. Burkey following the administration of Ativan;
- c. Failing to properly chart Donald E. Burkey's reactions following the administration of Ativan;
- d. Administering Haldol in levels that caused an overdose in Donald E. Burkey;
- e. Failing to recognize the adverse reactions of Donald E. Burkey following the administration of Haldol;
- f. Failing to properly chart Donald E. Burkey's reactions following the administration of Haldol;
- g. Administering Morphine in levels that caused an overdose in Donald E. Burkey;

- h. Failing to recognize the adverse reactions of Donald E. Burkey following the administration of Morphine;
- i. Failing to properly chart Donald E. Burkey's reactions following the administration of Morphine;
- j. Subjecting Donald E. Burkey to blunt force trauma in response to respiratory arrest.

10. Dr. Jocelyn Rowe did not, at any time, inform any member of Donald E. Burkey's family of her malpractice or the reason she disregarded DNR (do not resuscitate) order, and instead the family was told that Donald E. Burkey was on a respirator as she was trying medication to stabilize his seizures. Donald E. Burkey died once the respirator was removed.

11. Dr. Susan Constantino did not, at any time, inform any member of Donald E. Burkey's family of her malpractice or the reason she disregarded DNR (do not resuscitate) order, and instead the family was told that Donald E. Burkey was on a respirator as she was trying medication to stabilize his seizures. Donald E. Burkey died once the respirator was removed.

12. A proximate cause of the death of Donald E. Burkey was the negligence of Dr. Jocelyn Rowe.

13. A proximate cause of the death of Donald E. Burkey was the negligence of Dr. Susan Constantino.

14. A proximate cause of the death of Donald E. Burkey was the negligence of the employees of the Defendants.

15. That pursuant to Neb. Rev. Stat. §44-2840, plaintiff hereby waives the right to a medical panel review to the extent that any defendant is registered and is qualified under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§44-2801-2855. A copy of this Petition was served on the Nebraska Director of Insurance prior to the filing of this lawsuit in the Lancaster County District Court.

16. That nothing herein may be construed as an admission by the plaintiffs that they believe that the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§44-2801-2855 is constitutional and further plaintiff does specifically state that the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§44-2801-2855 violates the Nebraska Constitution and the Constitution of the United States.

FIRST CAUSE OF ACTION

17. Plaintiffs incorporate herein by this reference paragraphs 1 through 16 above as if fully set forth.

18. As a proximate result of the aforementioned negligence of Defendant, Donald E. Burkey suffered from respiratory arrest which led to his wrongful death; and by reason of the death of Donald E. Burkey, his next of kin have been deprived of Donald E. Burkey's care, comfort, companionship, society, love, and affection, as well as his services, and they have sustained general damages which have a definite ascertainable value as a result of this wrongful death. Donald E. Burkey's next of kin are:

- a. Kelle Lambert (daughter)
10635 Weeks Drive
Lincoln, NE 68516

b. Betsy Burkey (daughter)
351 Railroad Canyon Road, Suite E
Lake Elsinore, CA 92532

SECOND CAUSE OF ACTION: FUNERAL AND MEDICAL EXPENSES

19. Plaintiffs incorporate herein by this reference paragraphs 1 through 18 above as if fully set forth.

20. As a proximate result of the negligence of Defendant, the Estate of Donald E. Burkey has incurred approximately \$100,000 for medical, funeral and burial expenses.

THIRD CAUSE OF ACTION: PRE-DEATH INJURIES AND DAMAGES

21. Plaintiffs incorporate herein by this reference paragraphs 1 through 20 above as if fully set forth.

22. As a proximate result of the aforesaid negligence of Defendant, prior to his death Donald E. Burkey suffered injury, intense conscious pain and suffering, apprehension of pain and the fear of death, from the time of the first respiratory arrest on April 7, 2007.

PRAYER

WHEREFORE, Plaintiffs pray for judgment of general damages in an amount of \$2,000,000.00 on their first and third causes of action, and special damages of \$100,000.00 on their second cause of action, together with the costs of this action.

KELLE LAMBERT and BETSY BURKEY, Personal Representatives of the Estate of Donald E. Burkey, Plaintiffs

s/ Elizabeth A. Govaerts

Elizabeth A. Govaerts #20315

Vincent M. Powers & Associates

411 South 13th Street, Suite 300

Lincoln, NE 68508

402/474-8000

DEMAND FOR JURY TRIAL

The Plaintiff demands a jury trial herein.

s/Elizabeth A. Govaerts

ELIZABETH A. GOVAERTS

CLAIM FOR DAMAGE, INJURY, OR DEATH		INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.		FORM APPROVED OMB NO. 1105-0008								
<p>1. Submit To Appropriate Federal Agency: Department of Veterans Affairs Office of General Counsel 810 Vermont Avenue NW Washington, DC 20420</p>		<p>2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code) Donald C. Burkey, Deceased Kelle Lambert & Betsy Burkey, Co-Personal Representatives 1227 Lincoln Mall Lincoln, NE 68508</p>										
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input type="checkbox"/> CIVILIAN	4. DATE OF BIRTH 09/04/1936	5. MARITAL STATUS Widowed	6. DATE AND DAY OF ACCIDENT 04/07/07 to 04/08/07	7. TIME (A.M. OR P.M.)								
<p>8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.)</p> <p>On or about April 7, 2007 to April 8, 2007, Donald C. Burkey was injured and died while a patient at the Omaha Division of VA Nebraska Western Iowa Health Care System as a proximate result of the medical negligence of Dr. Jocelyn Rowe, Dr. Susan Constantino, and other currently unidentified persons. The medical malpractice and negligence included, among other things, the administration of overdoses of drugs, including Ativan. In addition, Mr. Burkey's written Health Directives were disregarded. Mr. Burkey was subjected to blunt force trauma. Mr. Burkey suffered substantial personal injuries and damages as a proximate result of the medical negligence.</p>												
<p>9. PROPERTY DAMAGE NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).</p> <p>BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See Instructions on reverse side.)</p>												
<p>10. PERSONAL INJURY/WRONFUL DEATH STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.</p> <p>The Decedent, Donald C. Burkey, died on April 8, 2007. Mr. Burkey's death was caused by multiple doses of drugs, including Ativan.</p>												
<p>11. WITNESSES</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 50%;">NAME</th> <th style="width: 50%;">ADDRESS (Number, Street, City, State, and Zip Code)</th> </tr> <tr> <td>See Attached Listing</td> <td>See Attached Listing</td> </tr> </table>					NAME	ADDRESS (Number, Street, City, State, and Zip Code)	See Attached Listing	See Attached Listing				
NAME	ADDRESS (Number, Street, City, State, and Zip Code)											
See Attached Listing	See Attached Listing											
<p>12. (See instructions on reverse.) AMOUNT OF CLAIM (in dollars)</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 25%;">12a. PROPERTY DAMAGE</th> <th style="width: 25%;">12b. PERSONAL INJURY</th> <th style="width: 25%;">12c. WRONGFUL DEATH</th> <th style="width: 25%;">12d. TOTAL (Failure to specify may cause forfeiture of your rights.)</th> </tr> <tr> <td></td> <td>\$1,000,000.00</td> <td>\$2,000,000.00</td> <td>\$3,000,000.00</td> </tr> </table>					12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)		\$1,000,000.00	\$2,000,000.00	\$3,000,000.00
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	\$1,000,000.00	\$2,000,000.00	\$3,000,000.00									
<p>I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM</p>												
<p>13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.) <i>Kelle Jo Lambert</i></p>		<p>13b. Phone number of person signing form 402-432-6136 / 951-500-3057</p>		<p>14. DATE OF SIGNATURE 8-15-07</p>								
<p>CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM</p> <p>The claimant is liable to the United States Government for the civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)</p>		<p>CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS</p> <p>Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)</p>										

11. WITNESS LIST
DONALD C. BURKEY, DECEASED

Dr. Rowen K. Zetterman, M.D., Chief of Staff	VA Nebraska - Western Iowa 4101 Woolworth Ave. Omaha, NE 68105
Kelle Lambert	10635 Weeks Drive Lincoln, NE 68516
Jane Boden	7200 Van Dorn Street Lincoln, NE 68506
Dr. Jocelyn Rowe	VA Nebraska - Western Iowa 4101 Woolworth Ave. Omaha, NE 68105
Dr. Susan Constantino	VA Nebraska - Western Iowa 4101 Woolworth Ave. Omaha, NE 68105
Dr. Matthias I. Okoye	VA Medical Center-3rd Floor 600 S 70th St Nebraska Forensic Medical Services Lincoln, NE 68510
Dr. Michael Belenky	
Dr. Naresh Atamprakash Dewan MBBS	9924 Westchester Omaha, NE 68114-3876
Danielle R. Henry, RN	410 W 30 Ave Bellevue, NE 68005
Dr. William J. Schlueter	